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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Subscriber Carrier	)	
Selection Changes Provisions of the	)	
Telecommunications Act of 1996	)	CC Docket No. 94-129
	)	
Policies and Rules Concerning	)	
Unauthorized Changes of Consumers	)	
Long Distance Carriers	)	

AT&T CORP. COMMENTS
ON RECONSIDERATION PETITIONS

Pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), and the Commission's Public Notice herein published June 8, 1999 (64 Fed. Reg. 30520), AT&T Corp. ("AT&T") submits these comments on the petitions of other parties[1] requesting the Commission to reconsider, and/or to clarify, portions of its Second Report and Order in this docket prescribing rules to control and provide remedies for "slamming".[2]

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1 In addition to AT&T, petitions were filed by Excel Telecommunications, Inc. ("Excel"); Frontier Corporation ("Frontier"); GTE Service Corporation ("GTE"); MediaOne Group ("MediaOne"); the National Association of State Utility Consumer Advocates ("NASUCA"); the National Telephone Cooperative Association ("NCTA"); the New York State Consumer Protection Board ("NYSCPB"); a coalition of "small, rural local exchange carriers" ("Rural LECs"); RCN Telecom Services, Inc. ("RCN"); SBC Communications, Inc. ("SBC"); and Sprint Corporation ("Sprint").

2 Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, CC Docket No. 94-129, Second

(footnote continued on following page)

These parties' filings overwhelmingly confirm that, as AT&T showed in its own reconsideration petition (at pp. 4-6), the Second Report and Order's requirement that "slammed" customers be absolved of all liability for the first 30 days of charges from an unauthorized carrier flatly contravenes Section 258 of the Communications Act, and is therefore unlawful. The petitions also confirm AT&T's showing (id. at 6-13) that, even apart from the unlawfulness of the absolution remedy, the procedures prescribed in the Second Report and Order for determining intercarrier and carrier-to-customer liability are complex, immensely burdensome, and inherently unfair. The Commission should therefore reconsider the absolution remedy and related liability determination procedures -- whose effectiveness has already been stayed by the Court of Appeals[3] -- and rescind those provisions.

Like AT&T (see Pet., pp. 13-23), other parties' petitions also show that the Second Report and Order unnecessarily restricts the ability of carriers to submit subscriber-authorized "freeze" orders, and changes in previously-submitted freezes, directly to local exchange carriers ("LECs") for implementation. These restrictions ignore both that verification of such freeze orders is no less reliable than for carrier selection changes, and that failure to permit such submission by carriers would seriously disserve the Commission's pro-competitive objectives in this

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Report and Order and Further Notice of Proposed Rulemaking, FCC 98-334, released December 23, 1998 ("Second Report and Order").

3 See MCI WorldCom, Inc. v. FCC, No. 99-1125 (D.C. Cir., May 18, 1999)("Stay Order").

proceeding. Modification of the currently prescribed restriction is therefore necessary.

Other changes in the carrier selection procedures prescribed in the Second Report and Order requested in the petitions should be rejected, however. In particular, there is no merit to the suggestions by NTCA and the Rural LECs that the Commission should retract its decision prohibiting executing carriers from verifying carrier change requests submitted by other carriers who have already certified their own compliance with the Commission's verification procedures. As the Second Report and Order correctly concluded (¶¶ 98-102), any such "verification" by the executing carrier is not only completely superfluous but is also likely to delay the timely effectuation of authorized carrier selection changes and to impair competition by providing illegitimate opportunities for LECs to advantage themselves in retaining or soliciting customers.

ARGUMENT

I. THE COMMISSION SHOULD RESCIND ITS ORDER ABSOLVING SLAMMED CUSTOMERS FROM PAYMENT OF CHARGES

AT&T showed (Pet., pp. 4-6) that the absolution remedy prescribed by the Second Report and Order conflicts directly with Section 258 of the Communications Act, which mandates that an unauthorized carrier "shall be liable to the carrier previously selected by the subscriber in an amount equal to all charges paid by such subscriber" to the unauthorized carrier (emphasis supplied). The petitions confirm that none of the grounds cited in the Second Report and Order for adopting the absolution remedy provides even colorable legal justification for dispensing with this statutory requirement.

In particular, as Frontier underscores in its petition (at. 6-8), neither Section 4(i) (47 U.S.C. § 154(i)), the "savings clause" in section 258(b) (47 U.S.C. § 258(b)), nor Section 201(b) of Communications Act authorize the Commission to abrogate the express Congressional directive embodied in Section 258. It is settled law that Section 4(i) is merely a "necessary and proper" clause for the Commission's exercise of authority otherwise consistent with provisions of the Act; that statutory provision is not an independent basis for substantive Commission authority.[4] Likewise, as Frontier points out, the Section 258(b) savings clause (which merely preserves "any other remedies provided by law") cannot reasonably be read to eviscerate the specific remedy prescribed in that same section.[5] Finally, Section 201(b) only authorizes the Commission to "carry out the provisions of [the] Act" -- not to substitute its own policy judgments for those adopted by Congress, as the Second Report and Order seeks to do.[6]

In like manner, Sprint (at 5-8) points out that, contrary to the Commission's conclusion in the Second Report and Order (¶¶ 29), the absolution remedy prescribed there is not "in addition to" the statutory remedy in Section 258; rather, such absolution entirely supplants the remedial scheme prescribed by Congress. Such action is unauthorized because "the Commission is not free to

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4 See AT&T at. 5 n.7; Frontier at 7, citing AT&T v. FCC, 447 F.2d. 865 (2d Cir. 1973.

5 See Frontier at 6 and n. 20 (citing cases).

6 See AT&T at 5; Frontier at 8.

substitute its judgment as to how best to control slamming for the judgment of Congress, as set forth in Section 258."[7]

In addition to the patent unlawfulness of the absolution remedy, the petitions mirror AT&T's showing that the procedures for implementing that remedy are grossly inequitable, as well as likely to be virtually unworkable in practice. In particular, these other parties echo AT&T's showing (at 6-8) that the Second Report and Order improperly assigns to the customer's previously authorized carrier responsibility for adjudicating carrier selection disputes -- despite the fact that it is clearly neither impartial nor unbiased, nor even may have the expertise required to fulfill that role.

For example, as RCN point out (at 3-4), it is imperative that the Commission remove the authorized carrier from "perform[ing] these multiple conflicting roles" because that entity is inherently biased both by its ability to enrich itself by a slamming finding and its need to maintain good relations with customers who have alleged a slamming complaint against another carrier. Similarly, Sprint (at 11) and Excel (at 3-4) recognize that the authorized carrier is inherently incapable of rendering an impartial determination of the merits of a slamming complaint; as Excel eloquently notes (at 4) "requiring the carrier to play prosecutor and judge simultaneously . . . is untenable."[8]

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[7] Sprint at 7.

[8] Accord, RCN at 3 (noting that under Commission's scheme "the authorized carrier . . . perform[s] multiple conflicting roles").

Petitioners also correctly point out that the absolution remedy creates powerful, perverse economic incentives for customers to delay reporting slamming incidents, or even to claim without any factual basis that they have been slammed. See AT&T at 9-13. As GTE notes (at 3), the Commission's procedure would, if allowed to take effect, "create[ ] an entirely new opportunity for [toll] fraud" because unscrupulous individuals "will certainly become aware of the opportunity for fraud that the thirty-day absolution offers and will quickly use it to their advantage." Sprint likewise recognizes (at 11) that the absolution remedy will inevitably lead to an increase in the number of reported slamming claims be it "will likely entice a perhaps not insignificant number of consumers who switch carriers to allege that they have been slammed." These observations further underscore the patent unreasonableness, as a policy matter, of the Commission's reliance on the absolution remedy.[9]

Finally, the petitions fully confirm AT&T's showing (at 8-12) that the complex procedures for liability determination and payments prescribed in the Second Report and Order will in all likelihood prove unworkable in practice. For example, SBC admits (at 6) that, as AT&T showed (at 9 n.14), under current industry CARE practices the authorized carrier frequently will not be notified of the identity of the allegedly unauthorized carrier and, thus, will be precluded from lodging a claim against the latter carrier for amounts paid by an allegedly slammed subscriber.

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[9] NASUCA's suggestion (at 2, 8) that the period in which a customer may seek absolution be made coextensive with the two year interval during which carriers are required to maintain records of an authorized carrier change would only exacerbate the already serious incentives for fraud and abuse created by the Commission's absolution remedy, and should be rejected out of hand.

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Moreover, SBC notes (at 5-7) that because LEC "PIC change" charges and procedures such as "PIC switchback" tariffs are not addressed in the Second Report and Order, the continued applicability of those mechanisms is left unclear. And the Commission's dispute resolution mechanism is immensely complex to administer, as AT&T showed in its reconsideration petition (at 7-10) and Sprint (at 13-14) also demonstrates. Indeed, even NASUCA (at 2, 10) describes these procedures as an "elaborate process" that is "fraught with opportunities for consumer misinformation and lack of information."

In sum, the petitions make it even clearer that the absolution remedy and related liability determination mechanism adopted in the Second Report and Order are fatally flawed, both as a matter of law and policy. For the reasons shown by AT&T and other parties described above, the Commission should promptly rescind those provisions.

II. THE COMMISSION SHOULD RECONSIDER ITS ORDER TO ASSURE THAT PREFERRED CARRIER FREEZES DO NOT IMPEDE COMPETITION.

AT&T also showed in its reconsideration petition (at 13-23) that the Second Report and Order unreasonably impedes convenient implementation of subscribers' carrier changes by unduly restricting the methods by which authorized carriers may submit carrier "freeze" orders, and changes in previously-submitted freezes, on behalf of end users. Specifically, the Commission concluded without

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NYSCPB's assertion (at 5) that the thirty-day absolution period is too short is meritless for the same reasons.

rational basis that the same verification procedures that assure the reliability of carrier-submitted PC changes are somehow insufficient to assure the integrity of carrier-submitted freeze orders or changes.[10] Additionally, the Commission erroneously failed to require LECs to provide automated means, in addition to three-way calling, to process customers' PC freeze orders and changes, or to provide other carriers' identification of frozen accounts that would allow prompt and efficient processing of PC changes.

Other parties' reconsideration petitions also support such modifications in the carrier freeze provisions of the Second Report and Order. As Excel correctly points out (at 7), prohibiting IXCs from submitting freeze orders on behalf of customers directly to LECs "would clearly provide an unwarranted competitive advantage for the ILECs, who control the implementation of virtually all PC freezes." Further, the current requirement that executing carriers (i.e., the LECs) alone may perform the verification function threatens to seriously impair competition; as Excel also points out (at 8) that this requirement "inserts the executing LEC directly into the relationship between the [IXC] and its customers" and, as a direct result, "allows the executing LEC one final opportunity to dissuade a [customer from] leaving . . . or to sell other services." RCN (at 7-9) likewise points out the serious

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[10] See Second Report and Order, ¶¶ 131. Paradoxically, while it rejected the adequacy of third party verification as a protection for freeze orders submitted to LECs by other carriers, the Commission nevertheless required LECs that administer freeze programs to verify subscribers' freeze requests using those same procedures.

anticompetitive effects of the limitations on PC freezes adopted in the Second Report and Order.

In light of these unwarranted results, the Commission should reconsider these aspects of the Second Report and Order, so that ILECs will not retain exclusive control over all customer contacts required to implement or remove PC freezes that disserves the goals of a competitive marketplace and customers' interests in a convenient carrier selection process.[11]

III. THE COMMISSION SHOULD DENY PETITIONS REQUESTING THAT LECs BE PERMITTED TO REVERIFY CARRIER-SUBMITTED PC CHANGE ORDERS.

In the Second Report and Order (¶¶ 97-101), the Commission concluded that executing carriers (such as LECs) not only are not required to duplicate the verification efforts of a submitting carrier, but that such additional verification efforts by an executing carrier must be expressly prohibited to protect both consumer interests and competition. First, the Commission found (¶ 98) that verification by the executing carrier "would be expensive, unnecessary, and duplicative of the submitting carrier's verification." Second, the Commission held (¶ 99) that such verification by the executing carrier "could have anticompetitive effects" because those carriers have both the incentive and ability to delay (or even

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[11] With this modification, an end user will be able conveniently to remove a freeze on his or her existing carrier selection and also to make a new carrier selection in the same transaction (such as a three-way call). LECs have long been obligated under the Commission's presubscription rules to implement such changes in response to customers' contacts with those carriers' business offices. See Investigation of Access and Divestiture Related Tariffs, 101 F.C.C.2d 911, 931 (1985)(Appendix B ¶ 22, stating that where customer makes such contacts the LEC "will initiate the [preferred carrier] change") (emphasis supplied).

altogether deny) change orders to advantage themselves or their affiliates providing long distance services. Third, the Commission found (id.) that executing carrier verification of carrier change requests would violate Section 222(b) of the Communications Act (47 U.S.C. § 222(b)), which prohibits telecommunications carriers from using customer proprietary data received from another carrier except for the purpose of providing the service(s) for which such data were supplied. Executing carriers could misuse this information to market its own services to affected customers in competition with the submitting carrier.[12] Finally, the Commission pointed out (¶ 100) that allowing executing carriers to delay processing an already-verified PC change order would be tantamount to unlawfully applying a carrier freeze to customers' accounts without any request or authorization from those subscribers for such treatment of their service.

NTCA, on behalf of its member ILECs, and a coalition of "Rural LECs" now request that the Commission reverse its decision and permit those carriers to continue to contact customers to obtain confirmation of IXC-submitted -- and previously verified -- carrier change orders before processing those requests.[13] Their petitions principally argue that the customer change order information submitted to

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12 See id. at n. 317 (referring to the discussion in ¶¶ 106-111 of the Second Report and Order on marketing use of carrier information).

13 These reconsideration petitions are premised on claims that these ILECs have experienced unusually high rates of slamming, but the petitions fail to support those assertions. For example, one ILEC admits that approximately half of the change orders it claims were improper "were determined to be invalid because of no such account, disconnected account, already assigned to that carrier, etc." Rural LECs at 4 (describing Blackfoot Telephone Cooperative data). Such purported problems reflect data deficiencies, not actual slamming.

them by other carriers is not covered by Section 222 because such data are already known to the end user subscribers, whom they claim are the only "customers" in such transactions.[14] These parties fail to come to grips with the other grounds articulated by the Commission for its decision to prohibit executing carrier verification of PC change orders.

In particular, the petitioners fail to rebut the Second Report and Order's well-justified concern that ILECs may use the PC change order data either to affirmatively market their own services to end users, or to delay or deny changes that would have the effect of displacing the ILECs as the subscribers' current service provider. Significantly, the petitions do not deny the fact that ILECs or their affiliates in many cases already provide competitive services.[15] These parties also fail to show provide any factual support for their contention that customers may hold them to blame for any slamming that may occur. See NTCA at 5; Rural LECs at 3. In all events, moreover, these carriers fail to demonstrate that protection of their purported "reputational interest" should take precedence over the specific interest of customers in timely implementation of their orders, and the public interest in protection of a competitive telecommunications marketplace. These parties' request for reconsideration of the Second Report and Order should therefore be denied.

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[14] See NTCA at 4-10. This claim is clearly misplaced; IXCs, the LECs' access customers, order Feature Group D access service that provides the "1+" dialing capability that allows end users to presubscribe to their services, and are thus also customers of the LECs.

[15] See Rural LECs at 5 n.4 (noting that only one named member of the more than 20 members of that coalition "does not provide or resale [sic] any type of long distance").

CONCLUSION

For the reasons stated above, the Commission should reconsider and modify, or in the alternative clarify, its Second Report and Order to the extent described above, and should otherwise deny the petitions for reconsideration.

Respectfully submitted,

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June 23, 1999

CERTIFICATE OF SERVICE

I, Beth Marchena, do hereby certify that on this 23rd day of June, 1999, a copy of the foregoing "AT&T Corp. Comments on Reconsideration Petitions" was served by US first class mail, postage prepaid, on the parties named on the attached service list.

Beth Marchena

June 23, 1999

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